

September 24, 2019

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Email: usdoj-officeoflegalcounsel@usdoj.gov
Re: Freedom of Information Act Request

Dear Ms. Golden,

As a member of the news media, I am making this request under the Freedom Of Information Act (“FOIA”), 5 U.S.C. § 552. I am also requesting that this be processed under expedited procedures.

Records Requested

Please provide the following records in a digital format:

Any opinions, guidance, formal or informal, in any written form relating to a whistleblower disclosure made to the Intelligence Community Inspector General (ICIG) in August 2019.

Any records of communications with the White House, Attorney General William Barr, the Office of the Director of National Intelligence, ICIG, or others concerning this matter, including notes memorializing conversations and emails.

Background

This disclosure was deemed by the ICIG to be both credible and of an “urgent concern,” as defined by 50 U.S.C. §3033(k)(5). The ODNI and the Justice Department (DOJ) viewed the disclosure differently. In a letter addressed to the congressional intelligence committees on September 13, 2019, the ODNI’s General Counsel referred multiple times to consultation with

the Department of Justice in reaching its decision not to share the whistleblower disclosure to the committees.¹

It has been reported that the Office of Legal Counsel (OLC) was the component of DOJ with which the ODNI consulted.²

The ICIG has written that he disagrees with the ODNI and DOJ's determination not to transmit the whistleblower's disclosure to the intelligence committees, noting his disagreement "particularly with DOJ's conclusion."³

Arguments Against Withholding OLC's Legal Opinion

OLC's best practices memo states that, "Timely publication of OLC opinions is especially important where the Office concludes that a federal statutory requirement is invalid on constitutional grounds." In the situation in question, ODNI--after consultation with DOJ--relied in part on constitutional arguments to justify not sharing the whistleblower information with the intelligence committees, despite a statutory requirement to do so based on a plain reading of the law.⁴ Further, OLC's best practices memo states: "In such situations, Congress and the public benefit from understanding the Executive's reasons for non-compliance, so that Congress can

¹ "[W]e determined, after consulting with the Department of Justice ("DOJ"), that no statute requires disclosure of the complaint to the intelligence committees." "[W]e consulted with DOJ concerning the appropriate way to handle the complaint." "[W]e determined, in consultation with DOJ, that the complaint did not state an urgent concern." Letter from the Office of Director of National Intelligence Office of General Counsel to the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence, about an Intelligence Community Whistleblower Complaint (September 13, 2019). <https://www.documentcloud.org/documents/6419414-Sept-13-Letter.html>

² Ken Dilanian and Julia Ainsley, "Trump communication reportedly at center of whistleblower complaint," NBC News, September 18, 2019. <https://www.nbcnews.com/politics/national-security/trump-communication-reportedly-center-whistleblower-complaint-n1056196>

³ Letter from the Intelligence Community Inspector General to the House Permanent Select Committee on Intelligence, about an Intelligence Community Whistleblower Complaint (September 17, 2019). https://intelligence.house.gov/uploadedfiles/20190917_-_ic_ig_second_letter_to_hpsci_on_whistleblower.pdf

⁴ "Under ICWPA, Congress enacted a framework to report matters of "urgent concern" within the Intelligence Community to Congress that protects both Congress' legitimate oversight responsibilities *as well as the constitutional authority of the President to determine how, when, and under what circumstances classified or privileged information may be reported to Congress.*" (emphasis added)

"We believe that it is important to apply the statute as it was written, because reading it to give a complainant a unilateral right to forward a complaint to the congressional intelligence committees would *raise serious constitutional questions.*" (emphasis added)

Letter from the Office of Director of National Intelligence Office of General Counsel to the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence, about an Intelligence Community Whistleblower Complaint (September 13, 2019). <https://www.documentcloud.org/documents/6419414-Sept-13-Letter.html>

consider those reasons and respond appropriately, and so that the public can be assured that Executive action is based on sound legal judgment and in furtherance of the President's obligation to take care that the laws, including the Constitution, are faithfully executed.”⁵

The memo goes on to list arguments for not publishing material, noting the deliberative process and attorney-client privileges and classified information as arguments against disclosure.

There are several reasons those arguments do not hold sway in this case, such as:

The case for disclosure of the requested material under the Freedom of Information Act is particularly strong because it concerns allegations of government wrongdoing deemed credible by an Executive Branch oversight office. As the D.C. Circuit Court wrote, "the purpose of FOIA is to permit the public to decide *for itself* whether government action is proper." (emphasis in original).⁶ Because the OLC opinion and OLC's involvement are also in question--by the ICIG and by members of Congress⁷--there is a strong public interest in disclosure of the OLC opinion--as noted above, this is also the kind of situation that OLC's own best practices memo states should tilt OLC towards disclosing its legal opinion.

Given all of the above, as the D.C. Circuit Court has held, the deliberative process privilege “disappears altogether when there is *any reason to believe* government misconduct occurred” because “shielding internal government deliberations in this context does not serve ‘the public’s interest in honest, effective government.’”⁸ (emphasis added)

Also, the ODNI is acting on the OLC opinion, therefore it's no longer pre-decisional.

Regarding the underlying substantive matters at hand (rather than the legal analysis and conclusion), the President has publicly confirmed many of the reported substantive matters in the

⁵ *Best Practices for OLC Legal Advice and Written Opinions*, Office of Legal Counsel (July 16, 2010), 5. <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf>

⁶ *Int'l B. Elec. Workers Local 41 v. HUD*, 763 F.2d 435 (D.C. Cir. 1985).

⁷ “in violation of the statute’s explicit command...in further contravention of the statute...Your office has attempted to justify doing so based on a radical distortion of the statute that completely subverts the letter and spirit of the law...In a further departure from the statute, your office consulted the Department of Justice about the complaint, even though the statute does not provide you discretion to review, appeal, reverse, or countermand in any way the IC independent determination, let alone to involve another entity within the Executive Branch in the handling of a whistleblower complaint.” Letter from the Chairman of the House Permanent Select Committee on Intelligence to the Acting Director of National Intelligence, about an Intelligence Community Whistleblower Complaint (September 13, 2019), 2. https://intelligence.house.gov/uploadedfiles/20190913_-_chm_schiff_letter_to_acting_dni_re_whistleblower_-_subpoena.pdf

⁸ IN RE: SEALED CASE, No. 96-3124. (D.D.C., 1997). <https://caselaw.findlaw.com/us-dc-circuit/1433973.html>

whistleblower's complaint⁹, waiving potential privileges in the course of doing so.¹⁰ Many of these matters by necessity were analyzed by the OLC in order for it to reach its conclusion that this information should not be transmitted to Congress under the ICWPA. This information cannot be properly withheld anymore because of the President's public statements.

As the Executive Order governing the nation's classification system states, "In no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to: ... prevent embarrassment to a person, organization, or agency" or for other reasons.¹¹ As stated, an independent Executive Branch oversight office--the ICIG--has deemed the whistleblower disclosure both credible and of urgent concern. Given the President's defensive statements, the material in question appears to be seen as a source of potential embarrassment by the President and thus that is another reason the material cannot be properly classified, especially when the President has aired this information in public statements.

The existence of DOJ's role was disclosed by the ODNI in multiple references in its letter to the House intelligence committee. As a federal appeals court held in 2005, such references to OLC's legal opinion to justify an agency position in communications with third parties is de facto an incorporation of the OLC opinion into agency policy, meaning privilege can no longer be asserted to block disclosure.¹²

⁹ The President confirmed in tweets that a conversation he had with a foreign leader is part of the whistleblower disclosure, though he characterizes it as a "perfectly fine and respectful conversation" and as "pitch perfect." President Donald Trump (@realDonaldTrump), "The Radical Left Democrats and their Fake News Media partners, headed up again by Little Adam Schiff, and batting Zero for 21 against me, are at it again! They think I may have had a "dicey" conversation with a certain foreign leader based on a "highly partisan" whistleblowers... statement. Strange that with so many other people hearing or knowing of the perfectly fine and respectful conversation, that they would not have also come forward. Do you know the reason why they did not? Because there was nothing said wrong, it was pitch perfect!" September 20, 2019.

<https://twitter.com/realDonaldTrump/status/1175023772375683074>

<https://twitter.com/realDonaldTrump/status/1175023773180932097>

In remarks made to reporters, he went further, confirming that the conversation was with Ukrainian President Volodymyr Zelensky: "The conversation I had was largely congratulatory, with largely corruption, all of the corruption taking place and largely the fact that we don't want our people like Vice President Biden and his son creating to the corruption already in the Ukraine." Peter Baker, "Trump Acknowledges Discussing Biden in Call With Ukrainian Leader," *The New York Times*, September 22, 2019.

<https://www.nytimes.com/2019/09/22/us/politics/trump-ukraine-biden.html>

¹⁰ Leah Litman and Laurence H. Tribe, "Waivers of Executive Privilege Can Be Informal, Take Care Blog, June 6, 2017.

<https://takecareblog.com/blog/waivers-of-executive-privilege-can-be-informal>

¹¹ Executive Order No. 13,526 (January 5, 2010). <https://www.dni.gov/index.php/ic-legal-reference-book/executive-order-13526>

¹² National Council of La Raza v. Department of Justice (May 31, 2005). <https://caselaw.findlaw.com/us-2nd-circuit/1410257.html> "the repeated references to the OLC Memorandum made by the Attorney General and his high-ranking advisors, the substance of their comments, and the way in which their comments were used-that is, to assure third parties ... We cannot allow the Department to make public use of the Memorandum when it serves the Department's ends but claim the attorney-client privilege when it does not. Because the Department, in light of all the facts and circumstances set forth above, incorporated the OLC Memorandum into the Department's policy, the attorney-client privilege cannot here be invoked to bar that Memorandum's disclosure"

The administration cannot have it both ways: airing characterizations of aspects of the whistleblower disclosure and the OLC legal analysis and conclusion and simultaneously withholding the underlying documentation addressing both.

I expect this request to be processed with due consideration of the points raised above.

Request for Expedited Processing

I request expedited processing of this request. This request meets two of the Justice Department's standards for granting expedited processing.¹³

1. "...the request is made by a person primarily engaged in disseminating information to the public and the information is urgently needed to inform the public concerning some actual or alleged federal government activity."

I am primarily engaged in disseminating information to the public. My journalism appears publicly on the Project On Government Oversight's website and in news outlets, such as The Daily Beast, Yahoo News, and Mother Jones.¹⁴ POGO has won awards and recognition for its journalism by journalism associations.¹⁵ POGO's work, including mine, also is routinely covered by others in the press.¹⁶ Informing the public of my investigative findings and those of my colleagues is my primary job function.

The information requested is urgently needed to inform the public of the Justice Department's reasoning for withholding from Congress the substance of the whistleblower disclosure—a disclosure that is, in fact, required by law. Currently there are vague references to potentially privileged information as well as other arguments in publicly available materials, but the actual reasoning--the application of law to the facts at hand--for why the whistleblower disclosure should not be disclosed to Congress, as the plain language of the Intelligence Community Whistleblower Protection Act requires, is not yet public. It is difficult to adequately assess the

¹³ <https://www.justice.gov/oip/departments-justice-freedom-information-act-reference-guide#expedited>

¹⁴ <https://www.pogo.org/about/people/nick-schwellenbach/> <https://news.yahoo.com/exclusive-monsanto-used-former-doj-lawyer-involved-in-epstein-case-to-quash-felony-charges-090028623.html>
<https://www.thedailybeast.com/ice-confines-some-detainees-with-mental-illness-in-solitary-for-months?ref=author>
<https://www.motherjones.com/politics/2018/08/bribery-trial-reveals-jeff-sessions-role-in-blocking-epa-action-targeting-one-of-his-biggest-donors/>

¹⁵ <http://spjdc.org/2015/06/2015-dateline-award-winners/> <https://sabew.org/2018-explanatory-small/>

¹⁶ https://www.google.com/search?biw=1216&bih=615&tbm=nws&ei=CvmIXYTtB-ShggfVxrWwDg&q=%22project+on+government+oversight%22+site%3Awashingtonpost.com&oq=%22project+on+government+oversight%22+site%3Awashingtonpost.com&gs_l=psy-ab.3...13881.17144.0.17345.24.24.0.0.0.186.1714.19j4.23.0....0...1c.1.64.psy-ab..1.1.90...33i299k1.0.WDO9QKYrvN8

merits of the Justice Department's position without this information and raises concerns that the Justice Department is flouting the law or is using legally questionable arguments (as a reminder, the ICIG is on the record stating his disagreement with the DOJ's conclusion).

In numerous previous instances, OLC's legal opinions haven't carried the day when those arguments been challenged in court--particularly when those opinions involve the White House, according to a recent study published in a law review.¹⁷ Because OLC's opinion is keeping Congress in the dark, it is even more important that OLC's legal reasoning be made public. Further, as OLC's legal opinion apparently is trumping the language of statutory law--the specific rationales and facts OLC marshals in doing so should at least be public.

By making the records requested public, that will help the public assess whether OLC thoroughly examined the underlying matter or accepted the characterizations of information by parts of the Executive Branch that have an interest in concealing potential wrongdoing. OLC's track record in this regard does not inspire confidence. As a former OLC attorney has recently written in a law review article, "even in OLC's formal opinions, there does not appear to be any uniform approach to vetting underlying facts--sometimes the facts are taken as stipulated, in reliance on other executive branch actors' assurances; sometimes the facts seem to be found implicitly by OLC; sometimes OLC simply states that the President could reasonably find certain facts as predicates of authority without explaining whether the President has or has not actually found those facts, let alone based on what evidence; and sometimes OLC concedes it does not have access to sufficient information to make a determination."¹⁸ Another former OLC attorney made a similar claim recently regarding deficiencies in the OLC's factfinding, particularly when the White House is involved.¹⁹ This matters because inadequate factfinding by OLC in the issuance of legal opinions--which operate as binding directives in the Executive Branch--can lead to flawed legal conclusions and the shielding of illegal and unethical conduct as well as other wrongdoing by officials within this branch of government, up to and including the President. And those are the high stakes in the matter at hand.

OLC's legal reasoning has stalled action responsive the whistleblower disclosure in the Executive Branch as well. The ICIG has stated. "I am bound by the determination reached as a result of the Acting DNI's consultations with DOJ." In sum, OLC's actions--themselves in question--have stalled efforts to investigate potential wrongdoing, which is fundamentally at odds with our system of checks and balances.

¹⁷ Adoree Kim, The Partiality Norm: Systematic Deference in the Office of Legal Counsel (April 18, 2018), Cornell Law Review, Vol. 103, No. 3, 2018. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3165256

¹⁸ Shalev Roisman, Presidential Factfinding (February 15, 2019), 72 Vanderbilt Law Review 825 (2019). <https://cdn.vanderbilt.edu/vu-wp0/wp-content/uploads/sites/278/2019/04/30122425/Presidential-Factfinding.pdf>

¹⁹ Elizabeth Newland, "Justice Department opinions take on the force of law--but are not, in fact, law," The Washington Post, May 31, 2019. https://www.washingtonpost.com/world/national-security/justice-department-opinions-take-on-the-force-of-law--but-are-not-in-fact-the-law/2019/05/30/f4efe222-8280-11e9-933d-7501070ee669_story.html

2. "...the subject of the request is of widespread and exceptional media interest and the information sought involves possible questions about the government's integrity which affect public confidence."

The records request relate to a subject that has been front-page news in national newspapers and prominently featured on major networks and cable news stations for the last week.²⁰ The chairs of five congressional committees issued a joint statement last week on the matter.²¹ The subject is a whistleblower disclosure that many, including many powerful members of Congress and legal experts, believe is being unlawfully and improperly withheld from Congress, impeding oversight into a matter of national concern, and is being discussed as playing a role in the potential impeachment of the President.²² The ICIG has written that his disagreement lies "particularly with DOJ's conclusion." All of this obviously creates questions concerning "the government's integrity which affect public confidence"--and OLC's legal opinions are central to this dispute.

The President's public statements on these matters also underscores the "widespread and exceptional media interest" as well as confirming the substance of reporting on aspects of the whistleblower's disclosures.

Fee Waiver Request

I request a waiver of all costs associated with fulfilling this submission pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). Disclosure of the requested records will further the "public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest" of the requester, the Project On Government Oversight (POGO). Specifically, POGO intends to use the requested records to highlight the Executive Branch's arguments against transmitting a whistleblower disclosure to Congress in a matter that the relevant empowered agency--the ICIG--believes it is legally required to send to Congress. If the request for a fee waiver is denied, please contact me about any incurred expenses prior to supplying the requested records.

²⁰ see:

<https://www.washingtonpost.com/national-security/2019/09/21/trumps-rhetoric-will-have-chilling-effect-future-whistleblowers-legal-experts-say/>

<https://www.nytimes.com/2019/09/22/us/politics/trump-impeachment-whistle-blower.html?action=click&module=Top%20Stories&pgtype=Homepage>

<https://www.nbcnews.com/politics/congress/impeachment-pressure-escalates-democrats-demand-release-whistleblower-s-trump-complaint-n1057551>

https://www.cnn.com/politics/live-news/trump-ukraine-president-biden/h_0cbf702299fe1boea6440a0aed7b1e2d

²¹ <https://oversight.house.gov/news/press-releases/president-s-attacks-on-intelligence-community-whistleblower-threaten-national>

²² <https://www.nytimes.com/2019/09/22/us/politics/trump-impeachment-whistle-blower.html>

Please see the following fee waiver statements.

The subject of the request:

POGO is requesting records which will inform readers about the state of whistleblower law in the intelligence community. We believe these records will allow us to better inform the public about the agency's communication about its activities and how they are portrayed to the public. These records are not currently posted online.

The informative value of the information to be disclosed:

The information to be disclosed is likely to contribute to an increased public understanding of government activities, as it relates to whistleblower disclosures in the intelligence community, the separation of powers, and the independence of inspectors general.

The contribution to an understanding of the subject by the public likely to result from disclosure:

POGO investigates, exposes, and seeks to remedy systemic abuses of power and mismanagement in the federal government. Founded in 1981, POGO is a politically independent, nonprofit watchdog that promotes a government that is accountable to the citizenry. POGO disseminates information about its activities to the public, policymakers, and the media via email, direct mail, and its websites which receives nearly 70,000 unique views per month. The records provided by your agency will be used for the following activities, which are publicly available: publication by email and on POGO websites; publication in reports and newsletters issued by POGO; publication in the newsletters of affiliated nonprofit organizations; efforts to educate Congress, the Executive Branch, and other policymakers; or in conjunction with other members of the news media.

The significance of the contribution to public understanding:

Disclosure of the records is likely to contribute significantly to the public's understanding of whistleblower disclosure processes in the intelligence community and limits being placed by the Executive Branch on statutory law. The requested records are not currently publicly available, and they will bring a unique perspective to the public discussion surrounding a high-profile whistleblower matter.

The existence and magnitude of a commercial interest:

POGO does not charge for access to its web site, reports, newsletters, or other publications. In addition, we do not directly profit from increased viewership of our website, as it is advertisement-free.

The primary interest in disclosure:

POGO has no financial interest in the requested information as stated above. The primary interest in disclosure is that of the public interest.

If this request is denied in full or in part, please cite each exemptions pursuant to 5 U.S.C. § 552(b) that justifies each denial. Please bear in mind that the foreseeable harm standard must be met before an exemption applies. If an exemption applies, however, please consider exercising the agency's discretionary release powers to disclose the records. Any such action supports the presumption of "openness" on which FOIA is based upon. Additionally, please release all reasonably segregable portions of the records that do not meet an exemption. 5 U.S.C. § 552(b).

I look forward to your response, including an individualized tracking number, within 20 days of the receipt of this request, unless, in the case of "unusual circumstances," the time limitation is "extended by written notice." 5 U.S.C. § 552(a)(6)(B). I am aware that all fees will be waived if specified time limits are not met. 5 U.S.C. § 552(a)(4)(A)(viii). I have a right to appeal if this request is wholly or partially denied or if the agency fails to respond within 20 days, and that, if successful, a federal district court may assess "reasonable attorney fees and other litigation costs." 5 U.S.C. § 552(a)(4)(E).

Please do not hesitate to call me at (202) 347-1122 to see if I can clarify the request or otherwise expedite and simplify your efforts. Thank you for your prompt attention to this matter.

My colleagues Lance Sims, Lydia Dennett, and Scott Amey are all empowered to inquire about this request and receive the records on my behalf.

Sincerely,

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